



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 14, 1994

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Legal Affairs Division
P.O. Box 99
Huntsville, Texas 77342-0099

OR94-652

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ Your request was assigned ID# 20183.²

The Texas Department of Criminal Justice (the "department") has received several requests for certain information concerning the selection and promotion process for several employment positions with the department. Generally, the requested documents include information relating to the qualifications of persons competing for employment positions; scores assigned by evaluators; and questions asked by promotion board members. You advise us that some of the requested information will be made available to the requestors. You object to release of some of the requested information, however, and claim that it is excepted from required public disclosure by sections 552.101, 552.102, 552.108, 552.111, 552.117, and 552.122 of the Government Code.³

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

²We address here several other requests involving similar information. These requests were assigned ID#s 20875, 21845, 21841, 23445, and 24312.

³You have submitted representative samples to us for review. In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if

You assert section 552.101, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," in conjunction with common-law privacy. You also claim that some of the requested information is excepted from required public disclosure by section 552.102 of the Government Code. Section 552.102 excepts "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications of public employees. Open Records Decision Nos. 470, 467 (1987). Information previously held by this office not to be protected by common-law privacy interests includes, for example, applicants' and employees' educational training, names and addresses of former employers, dates of employment, kind of work, salary, and reasons for leaving, names, occupations, addresses and phone numbers of character references, job performance or ability, birth dates, height, weight, marital status, and social security numbers. See Open Records Decision No. 455 (1987); see also Open Records Decision Nos. 470, 467; 444 (1986); 421 (1984); 405 (1983). We have examined the information submitted to us for review. We conclude that it does not contain any information that is intimate or embarrassing. Accordingly, the submitted information may not be withheld from required public disclosure under sections 552.101 and 552.102 of the Government Code.

We address next your assertion that section 552.108 of the Government Code excepts the requested information from required public disclosure. Section 552.108 excepts:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime

(Footnote continued)

each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.

Gov't Code § 552.108. When the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2; Open Records Decision No. 287 (1981) at 1-2. The department is a law enforcement agency within section 552.108 of the act. Open Records Decision No. 413 (1984).

You partially base your section 552.108 claim on a general theory that release of employee selection records would undermine the effectiveness of the employee selection and promotion process because it would have a chilling effect on the evaluator's ability to be frank in giving his or her evaluation of a candidate. Essentially, you argue that section 552.108 incorporates aspects of the section 552.111 exception. This office, however, has never held that section 552.108 incorporates the policy rationale underlying section 552.111. Moreover, the rationale for section 552.111 that you seek to incorporate into section 552.108 was rejected in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). See *infra* discussion of section 552.111. You may not withhold the requested information on the basis of this argument under section 552.108.

You also contend under section 552.108 that release of the requested information would create "the potential for mind tripping and psychological manipulation on the part of canny inmates using this information." This assertion is too conjectural in nature and you have not explained its significance to the requests for records at issue here. You have not demonstrated that release of the requested information would unduly interfere with law enforcement, nor does the submitted information provide an explanation on its face. Accordingly, we conclude that the department may not withhold the information under section 552.108 of the Government Code.

You also claim that the requested information is excepted from required public disclosure by section 552.111 of the Government Code, which excepts information that constitutes an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Some of the documents you have submitted for our review clearly do not constitute internal memoranda containing communications between department employees. Such documents, e.g., professional certificates and commendations and transcripts from educational institutions, do not fall within the section 552.111 exception in any event.

Furthermore, in Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception in light of the *Gilbreath* decision and held that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6. As the information submitted to us for review relates to an internal administrative and personnel matter, we conclude that section 552.111 does not except it from required public disclosure.

You also seek to withhold some of the requested information under section 552.117 of the Government Code, which excepts:

(1) the home address or home telephone number of:

(A) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024; or

(B) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code; or

(2) the home address, home telephone number, or social security number of an employee of the Texas Department of Criminal Justice, or the home or employment address or telephone number, name, or social security number of a family member of the employee.

Gov't Code § 552.117. Section 552.024 provides that section 552.117(1)(A) is applicable only when an employee indicates in writing that he or she does not want his or her home address or telephone number disclosed. A department employee, however, need not indicate in writing that he or she does not want his or her home address or telephone number disclosed. *See generally* Open Records Decision No. 488 (1988). Such information is expressly excepted from required public disclosure by section 552.117(2) and must not be released.

Finally, you claim that some of the requested information is excepted from required public disclosure by section 552.122 of the Government Code. Section 552.122 excepts in relevant part:

(a) A . . . test item developed by an educational institution that is funded wholly or in part by state revenue

(b) A test item developed by a licensing agency or governmental body.

Gov't Code § 552.122. In Open Records Decision No. 626 (1994) (copy enclosed), this office determined that the term "test item" in section 552.122 "includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *Id.*

We have examined the information for which you seek section 552.122 protection. We conclude that some of this information encompasses evaluations of an employee's suitability for employment and does not fall within the section 552.122 exception. We conclude that other information, however, constitutes test items. This type of information has been marked and may be withheld from required public disclosure under section 552.122 of the Government Code.

Finally, you ask if you are required to release two documents relating to questions asked of applicants and employees about disabilities they may have. You are concerned that the federal Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, prohibits disclosure of the information. This question raises a new issue that we have not addressed in previous open records decisions. We therefore reserve a determination on this question to be answered in a formal open records decision. You may withhold those two documents, labeled as pages 152 and 156 in the documents submitted for our review, pending the outcome of our decision on this matter. The remaining information submitted to us for review, except as noted above, must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

A handwritten signature in cursive script that reads "Loretta DeHay". The signature is written in dark ink and is positioned above the typed name and title.

Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Ref.: ID# 20183
ID# 20875
ID# 21841
ID# 21845
ID# 23445
ID# 24312

Enclosures: Open Records Decision No. 626
Marked documents

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